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No. 07-1607

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IN THE

Supreme Court of the United States

SHELL OIL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA; DEPARTMENT OF TOXIC SUBSTANCES CONTROL, STATE OF CALIFORNIA,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTIONS PRESENTED

1. Whether liability for "arranging for disposal" of hazardous substances under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(a)(3), may be imposed upon a manufacturer who merely sells and ships, by common carrier, a commercially useful product, transferring ownership and control to a purchaser who causes contamination involving that product.

2. Whether joint and several liability may be imposed upon several potentially responsible parties under CERCLA, 42 U.S.C. § 9607(a), even where a district court finds an objectively reasonable basis for divisibility that would suffice at common law.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

In addition to the parties named in the caption, The Burlington Northern and Santa Fe Railway Company, successor in interest to the Atchison, Topeka & Santa Fe Railroad Co. and now named BNSF Railway Company, and Union Pacific Railway Company, formerly Southern Pacific Transportation Company, were defendants-appellees below and are petitioners in the consolidated case, No. 07-1601.

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit and the eight-judge dissent from the denial of rehearing *en banc* (Pet.App. 1a-76a)[1] are reported at 520 F.3d 918. The opinion of the district court (Pet.App. 77a-265a) is *available at* 2003 WL 25518047.

JURISDICTION

The Ninth Circuit entered its amended judgment and denied the petitions for rehearing *en banc* on

[1] "Pet.App." refers to the Petition Appendix filed in No. 07-1607.

March 25, 2008. The petition for writ of certiorari was filed on June 23, 2008, and granted on October 1, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607, are reproduced in the Petition Appendix (Pet.App. 266a-267a).

STATEMENT

The decision of the Ninth Circuit below, in conflict with decisions of other circuits, expands liability under CERCLA, 42 U.S.C. § 9607, in two unprecedented ways. First, it imposes "arranger" liability under CERCLA upon a manufacturer that merely sold and shipped, by common carrier, a useful product (not waste) to a purchaser that acquired ownership and control upon the common carrier's arrival at the purchaser's facility. Second, it holds two parties, a manufacturer and a landowner, jointly and severally liable under CERCLA despite their attenuated connection to any contamination and despite the district court's finding of an objectively reasonable basis for apportioning fault. No court of appeals has ever extended CERCLA liability so far.

A. Statutory Background

Congress enacted CERCLA in 1980 to address "the serious environmental and health risks posed by industrial pollution." *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). CERCLA provides for recovery of the costs of responding to and remediating sites where hazardous waste has been disposed into the environment, and aims to ensure "that those

responsible for any damage, environmental harm, or injury from [hazardous waste] bear the costs of their actions." S. REP. NO. 96-848 (1980).

Congress limited liability for the costs of remediation of hazardous waste sites under CERCLA to four categories of "Potentially Responsible Parties" ("PRPs") set forth in 42 U.S.C. § 9607(a):

> (1) the *owner and operator* of ... a facility,
>
> (2) any person who at the time of disposal of any hazardous substance *owned and operated* any facility at which such hazardous substances were disposed of,
>
> (3) any person who by contract, agreement, or otherwise *arranged for disposal* or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person ..., and
>
> (4) any person who accepts or accepted any hazardous substances for *transport* to disposal or treatment facilities ....

Id. § 9607(a)(1)-(4) (emphasis added). Congress did not elaborate on the definitions of these categories, and there is no legislative history illuminating Congress's intent with respect to "arranger" liability. Nor does CERCLA specify how liability should be determined when multiple parties are involved at a facility.

Manufacturers of useful products are not listed among the enumerated PRPs in CERCLA. Congress instead chose to deal with manufacturers of useful products by taxing them for contributions to what became known as the Hazardous Substance

Superfund. *See* CERCLA, Pub. L. No. 96-510, §§ 201, 211, 221, 94 Stat. 2767, 2797-802 (1980) (codified at 26 U.S.C. §§ 4611, 4661 & 4662).

CERCLA incorporates the definitions of "disposal" and "treatment" set forth in the Solid Waste Disposal Act ("SWDA"). *See* 42 U.S.C. § 9601(29). "Disposal" is defined as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any ... hazardous waste into or on any land ... so that [it] may enter the environment ...." 42 U.S.C. § 6903(3). "Treatment" is defined as "any method, technique or process ... designed to change ... hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous ...." 42 U.S.C. § 6903(34).[2]

B. Factual Background

Brown & Bryant, Inc. ("B&B"), now defunct, owned and operated an agricultural chemical storage, sale and application facility in Arvin, California, from 1960 to 1988. Pet.App. 80a, 127a. In 1975, B&B expanded onto an adjacent parcel by leasing 0.9-acres from the predecessors in interest of The Burlington Northern and Santa Fe Railway Company and Union Pacific Railroad Company (the "Railroads"). Pet.App. 81a, 183a. During its 29 years of operation, B&B rinsed chemicals into an unlined sump when application equipment returned from farmers' fields. This sump funneled contamination into the underlying groundwater. *E.g.*, Pet.App. 127a.

Shell was one of the manufacturers from which B&B purchased chemicals. Shell sold B&B a soil fumigant called D-D, which was intended to protect

[2] Since Respondents have not alleged that Shell arranged for the "treatment" of any product, only "disposal" is at issue.

crop roots from attack by nematodes. Pet.App. 83a-84a. D-D was sold as a new product to B&B ready for use, and B&B in turn either sold the product to its customers or applied it to farmland for them. Pet.App. 83a-86a. Shell did not sell D-D to B&B on consignment and B&B did not have to formulate D-D for use. Pet.App. 86a.

Shell delivered D-D to B&B in bulk shipments via common carrier tank truck, and all sales were "FOB Destination," meaning that title, ownership and control passed to B&B when the common carrier arrived at the B&B facility. Pet.App. 85a; J.A. 264-65 (Shell intended B&B to take "stewardship [of the product] upon the common carrier arriving at [B&B's] facility"). The sales contracts expressly provided that B&B would provide safe and adequate "facilities for receiving and storing all Products delivered" and would "unload each delivery promptly and at [B&B's] own risk and expense." Pet.App. 210a; J.A. 583 (setting forth Shell's "Conditions of Sale").

B&B employees spilled small quantities of D-D in the process of unloading the chemical from the common carrier tank trucks into B&B's bulk storage tanks. Pet.App. 116a-119a, 255a-256a. B&B could have utilized equipment and procedures to avoid even these small spills, but did not. J.A. 224-27, 254-55, 257-61 (discussing methods to prevent spillage, such as using a tank side pump, dripless couplings, collection buckets, "walking the hose" to drain any remaining product, or installing a concrete pad in the unloading area). B&B employees also spilled D-D after delivery when they transferred the chemical from storage tanks to nurse tanks, rigs and bobtail trucks, and when they rinsed D-D onto the ground in the course of washing out this equipment. Pet.App.

87a-89a, 256a-259a. D-D was a volatile chemical that was designed to vaporize upon application to the ground. Pet.App. 101a. By using an unlined sump to collect rinse-water, however, B&B enabled D-D dissolved in water to permeate underground. Pet.App. 100a-101a.

C. Proceedings In The District Court

In the early 1980s, the United States Environmental Protection Agency ("EPA") and California's Department of Toxic Substances Control ("California") found evidence of soil and groundwater contamination at B&B's facility. Pet.App. 79a. In 1988, the government agencies issued a remediation order, the costs of which drove B&B into insolvency. Pet.App. 127a. In 1996, the United States and California filed CERCLA actions against Shell and the Railroads for reimbursement of the investigation and clean-up expenses at the Arvin facility.

The District Court for the Eastern District of California (Wanger, J.), after a bench trial and post-trial motions, issued detailed findings in a 191-page amended opinion. Pet.App. 77a-265a. The court found the Railroads liable under 42 U.S.C. § 9607(a)(1) and (2) as an owner of land that was part of the Arvin facility at the time of disposal of hazardous chemicals. Pet.App. 175a-187a.

The district court found that Shell was not liable as an "operator" under 42 U.S.C. § 9607(a)(2). The court acknowledged that "Shell did not participate in the day-to-day operations of the Arvin facility or act in a managerial capacity for the plant's facilities, ... exercise discretion over the facilities' storage and sale activities, ... [or] assume actual control of the [delivery and unloading] processes." Pet.App. 193a. The

court also conceded that Shell's "activities at most covered shipping and receiving D-D to the Arvin plant by common carrier as a precursor to bulk storage of its product, D-D," Pet.App. 196a, and that "Shell did not retain ownership of its products after delivery to B&B," Pet.App. 208a.

The district court nonetheless found that Shell was liable as an "arranger" of hazardous waste disposal under 42 U.S.C. § 9607(a)(3). Pet.App. 188a-220a. The court held that it was sufficient for arranger liability that "Shell knew that spills were inherent in the transfer to storage tank [sic], delivery-unloading process." Pet.App. 214a.

Having found Shell and the Railroads liable under CERCLA, the district court concluded that there was a reasonable basis for apportioning responsibility, applying the test in Restatement of Torts (Second) § 433A. As the district court stated, "this is a classic 'divisible in terms of degree' case, both as to the time period in which defendants' conduct occurred, and ownership existed, and as to the estimated *maximum contribution* of each party's activities that released hazardous substances that caused Site contamination." Pet.App. 241a (emphasis added).

As to the Railroads, the district court examined the activities that took place on each portion of the facility and found that the primary sources of groundwater contamination at the facility all were located on B&B's parcel. Pet.App. 250a-251a. The court apportioned the harm by multiplying the percentage of the overall land that the Railroads owned (19.1%), by the percentage of the 29 years of B&B's operations during which it leased land from the Railroads (45%), by a discount (66%) for the fact that only two of the three hazardous products were stored on the

Railroads' land, arriving at an initial figure of 6%. Pet.App. 254a-255a. The court then increased that figure by half to be conservative, assigning 9% of the total liability to the Railroads. Pet.App. 255a.

As to Shell, based on extensive direct evidence presented at trial, the district court compared the volume of spillage of D-D during the common carrier bulk deliveries (1,863 gallons) with the total volume of spillage of D-D throughout the facility from the combined activities of delivery, storage, transfer, and equipment rinsing (31,212 gallons). Pet.App. 255a-260a. Based on these calculations, which took worst-case scenarios into account, and the finding that Shell had "operational control" only over the bulk unloading, the court concluded that Shell's divisible share was 6%. Pet. 259a-260a.

D. Proceedings In The Court Of Appeals

In an opinion filed March 16, 2007, a panel of the Ninth Circuit affirmed the district court's finding that Shell was liable as an "arranger," but reversed the district court's divisibility determination and instead imposed joint and several liability on Shell and the Railroads for the entire cost of cleanup at the Arvin facility.

On May 7, 2007, both Shell and the Railroads filed petitions for rehearing and rehearing *en banc*. On September 4, 2007, the panel amended its opinion to make several revisions. On March 25, 2008, the Ninth Circuit denied rehearing *en banc*, but the panel further amended some of the language in its opinion (including deletion of its references to CERCLA as a "super strict liability" statute and its initial statement that apportionment was available

only where "perfect information" existed[3]) and issued an amended final decision. Pet.App. 1a-51a. Eight judges dissented from the denial of rehearing *en banc*. Pet.App. 52a-75a.

E. The Court Of Appeals Decision

The final decision of the Ninth Circuit panel (Berzon, J., joined by B. Fletcher, J., and Gibson, J., sitting by designation), as twice amended, opened by expressing concern that government "agencies were ... left holding the bag for a great deal of money" in the Arvin site cleanup, Pet.App. 3a, and suggested that a "key purpose" of CERCLA was to shift environmental cleanup costs away from taxpayers to available private entities. Pet.App. 9a.

1. *Arranger Liability*

In affirming the district court's determination that Shell was liable as an "arranger" under 42 U.S.C. § 9607(a)(3), the panel asserted that arranger liability may be imposed when disposal of hazardous wastes is merely "a foreseeable byproduct of" a sale of hazardous substances. Pet.App. 42a. Noting that "'*disposal*' need not be purposeful" because it "includes such unintentional processes as 'leaking,'" the panel suggested that it follows that "an entity can be an *arranger* even if it did not intend to dispose of the product." Pet.App. 44a (emphasis added).

The panel acknowledged that prior decisions had "refused to hold manufacturers liable as arrangers for selling a useful product containing or generating hazardous substances that *later* were disposed of."

[3] *United States v. Burlington Northern & Santa Fe Ry. Co.*, 502 F.3d 781, 792, 795 n.16, 796, 799, 801 (9th Cir. 2007), *amended by order denying petition for rehearing en banc*.

Pet.App. 45a. But the panel asserted that here, "the sale of a useful product necessarily and immediately result[ed] in the leakage of hazardous substances." Pet.App. 45a. The panel likewise denied "that ownership or control at the time of transfer are the sine qua non of nontraditional arranger liability," Pet.App. 48a, concluding that "[h]ere, ownership at the time of disposal is not an informative consideration," and it "need not determine the precise moment when ownership transferred to B&B." Pet.App. 49a. It was sufficient, according to the panel, that "Shell arranged for the sale and transfer of chemicals under circumstances in which a known, inherent part of that transfer was the leakage, and so the disposal, of those chemicals" even though Shell did not own those chemicals or control that leakage. Pet.App. 50a.

2. *Apportionment*

The panel decision accepted that "apportionment is available at the liability stage in CERCLA cases," and agreed that it is appropriate to look "to common law principles of tort in general, and the Restatement in particular," to determine when to impose joint and several liability and when and how to apportion fault. Pet.App. 15a. The panel also accepted "that harm may be apportioned when 'there exists a reasonable basis for divisibility' of a single harm." Pet.App. 14a, 16a (quoting *United States v. Hercules, Inc.*, 247 F.3d 706, 717 (8th Cir. 2001)). The panel nonetheless reversed the district court's apportionment ruling as to both Shell and the Railroads, Pet.App. 40a-41a, 36a-37a, holding that the district court had failed to establish such a "reasonable basis." Pet.App. 16a n.18, 37a, 41a.

As to the Railroads' share of liability, the panel faulted the district court for using "a 'meat-axe' approach ... premised on percentages of land ownership," and a "simple fraction based on the time that the Railroads owned the land." Pet.App. 34a, 35a. The panel suggested that only much more detailed records establishing the Railroads' relative contribution to contamination would suffice. The panel conceded that a landowner often will have no such documentation and acknowledged that the perverse result of its approach "may be that landowner PRPs, who typically have the least direct involvement in generating the contamination, will be the least able to prove divisibility." Pet.App. 36a.

As to Shell's share of liability, the panel conceded that "there is *some* volumetric basis for comparing its contribution" with respect to the single contaminant D-D "to the total volume of contamination on the Arvin site," but held that a pro rata share of leakage is an insufficient proxy for a pro rata share of contamination on the site. Pet.App. 37a-38a. The panel faulted the district court for failing to account for "the possibility that leakage of one chemical might contribute to more contamination than leakage of another" or that "some contaminants are more expensive than others to extract from the soil." Pet.App. 38a. The panel also contended that the data upon which the district court relied was insufficient to determine the "total leakage over the entire twenty-three year period that Shell supplied B&B with D-D." Pet.App. 39a.

3. *Dissent from Denial of Rehearing En Banc*

Judge Bea, joined by Chief Judge Kozinski and Judges O'Scannlain, Kleinfeld, Gould, Tallman,

Callahan and N.R. Smith, dissented from denial of rehearing *en banc*. The dissent noted that the panel's interpretation of arranger liability "creates ... inter-circuit conflicts in an area of the law where uniformity among circuits is of paramount importance," and that the panel's apportionment standard was "novel and unprecedented" and imposed "impossible-to-satisfy burdens on CERCLA defendants." Pet.App. 52a.

With respect to arranger liability, the dissent concluded that, "[b]y imposing arranger liability on a mere seller, the panel stretches the meaning of arranger liability beyond any cognizable limit." Pet.App. 71a. The dissent noted that, even if "*disposal*" includes unintentional processes like spilling and leaking, "arranger liability requires the defendant to have '*arranged* for' such disposal," and suggested that arrangement "connotes an intentional action" aimed at disposal rather than merely at sale. Pet.App. 70a (emphasis altered). The dissent noted with approval other circuits that have held "'that the mere sale of a product is not 'arranging for disposal' under CERCLA.'" Pet.App. 71a (quoting *AM Int'l, Inc. v. Int'l Forging Equip. Corp.*, 982 F.2d 989, 999 (6th Cir. 1993)). The dissent reasoned that, at a minimum, arranger liability requires actual control over hazardous waste disposal, and that here, where "Shell relinquished control over the D-D once the common carrier arrived at the B&B site," no such actual control could be established. Pet.App. 73a.

Regarding apportionment, the dissent stated that the panel had paid mere "lip-service" to the correct common law principle, reflected in the Restatement, that only a reasonable estimate of apportionment is required in order to impose several rather than joint and several liability. The dissent reasoned that the

panel had made that standard impossible to satisfy as a practical matter. Pet.App. 53a-54a; 73a-74a n.32.

SUMMARY OF ARGUMENT

I. The Ninth Circuit erred in holding Shell liable as an "arranger" under CERCLA, 42 U.S.C. § 9607(a)(3), despite the fact that it merely sold a useful commercial product that was transported by common carrier to a purchaser that assumed full ownership, possession and control prior to any spillage. The Ninth Circuit's errors with respect to "arranger" liability are threefold, and each provides an independent basis for reversal.

First, the court of appeals failed to adhere to the plain meaning of the statutory phrase "arranged for," thus imposing liability on a corporation that lacked any intent to make plans or preparations for the disposal of hazardous waste.

Second, the court of appeals ignored the statutory definition of "disposal" as involving the discarding of hazardous "waste," and extended liability despite the absence of evidence that the D-D soil fumigant—a useful product designed for ongoing use constituted "waste."

Third, the court of appeals ignored the "ownership" or "possession" requirements in § 9607(a)(3) and imposed arranger liability even though the purchaser assumed full ownership and possession of the product as soon as the common carrier delivery trucks entered its premises and before any transfer of the product occurred. The court of appeals wrongly imposed liability even though Shell had no control over, or involvement in, the transfer process, and the

waste was generated as a result of the purchaser's operations.

II. Even if the court of appeals did not err in holding Shell liable as an "arranger," its judgment should still be reversed because it misapplied well-established standards governing apportionment of liability. In enacting CERCLA, Congress expressly rejected mandatory joint and several liability, instead approving of such liability only where consistent with the common law. Courts have universally looked to the apportionment standards set forth in the Restatement (Second) of Torts when apportioning liability under CERCLA. The Restatement requires only that a "reasonable basis" exist for apportioning liability, not, as the court of appeals required, a precise calculation based on documentary support. If, as the court of appeals held, the district court's detailed factual findings do not present a reasonable basis for apportioning Shell 6% of the liability, it is difficult to conceive of a CERCLA defendant that would be able to avoid joint and several liability, contrary to Congress's intent.

The judgment below should be reversed.

ARGUMENT

I. THE NINTH CIRCUIT DECISION ERRONEOUSLY IMPOSES CERCLA LIABILITY FOR ARRANGING FOR THE DISPOSAL OF HAZARDOUS WASTE UPON CORPORATIONS ENGAGED IN THE MERE SALE AND TRANSPORT OF USEFUL PRODUCTS.

The Ninth Circuit's imposition of "arranger" liability on a company that merely sold a useful consumer product, and then transported it by common carrier

to a purchaser that assumed full ownership, possession and control, departs from the text of CERCLA in three ways. *First*, the court of appeals failed to adhere to the plain meaning of the statutory phrase "arranged for," and imposed liability on Shell despite its lack of intent to dispose of hazardous waste. *Second*, the court ignored the statutory definition of "disposal" as involving the discarding of hazardous "waste," and extended liability despite the fact that Shell sold and shipped a useful product, not "waste." *Third*, the court ignored the "ownership" or "possession" requirements in § 9607(a)(3) and imposed arranger liability despite Shell's lack of ownership, possession or control at the time of disposal.

This Court also should reject the panel's novel attempt to rest arranger liability on constructive knowledge of, and attempts to discourage, spills by a third-party purchaser. By treating Shell's efforts to encourage safe handling of D-D as an index of constructive control over the chemical's "disposal," the panel discourages future efforts by corporations to enhance the safe transfer and handling of their products surely a perverse result that Congress did not intend in enacting CERCLA.

"[S]tatutes have not only ends but also limits. Born of compromise, laws such as CERCLA . . . do not pursue their ends to their logical limits. A court's job is to find and enforce stopping points no less than to implement other legislative choices." *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155, 157 (7th Cir. 1988) (internal citations omitted).

A. Arranger Liability Should Be Construed Based On The Plain Meaning Of CERCLA's Terms

This Court has consistently held that, "[w]hen terms used in a statute are undefined, we give them their ordinary meaning." *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) (giving the undefined term "marketing" in the Plant Variety Protection Act its ordinary meaning) (citing *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), which construed "cognizable" under 28 U.S.C. § 1346(b) in accord with its dictionary definition); *see also United States v. Santos*, 128 S. Ct. 2020, 2024 (2008) (defining the term "proceeds" in the federal money-laundering statute based on its "ordinary meaning") (citing *Asgrow*, 513 U.S. at 187); *BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91-94 (2006) (interpreting the terms "action" and "complaint" in statute providing for six-year statute of limitations for government-initiated lawsuits based on their ordinary meaning); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S. 370, 376 (2006) (interpreting the undefined term "discharge" in the Clean Water Act "'in accordance with its ordinary or natural meaning'") (quoting *Meyer*, 510 U.S. at 476)).[4]

Because Congress gave no guidance on the scope of arranger liability in § 9607(a)(3), the scope of such liability should be defined based on the plain mean-

[4] These decisions interpreting undefined terms in light of their plain meaning follow well-settled general principles of statutory construction. *See* 2A Norman J. Singer, SUTHERLAND STATUTORY CONSTRUCTION § 46.1 (1992) ("The rules of statutory construction favor according statutes with their plain and obvious meaning, and therefore one must assume that the legislature knew the plain and ordinary meanings of the words it chose to include in the statute.").

ing of that subsection's terms. The Court has applied these principles in construing other provisions of CERCLA. For instance, in *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157 (2004), the Court looked to the "natural meaning," *id.* at 166, of CERCLA's contribution provision to determine whether a private party that had not been sued in a CERCLA administrative or cost recovery action could seek contribution from other liable parties.

Likewise, the Court applied the plain meaning of the word "operator" in construing 42 U.S.C. § 9607(a)(2). In *United States v. Bestfoods*, 524 U.S. 51, the Court considered whether a parent corporation could be liable as an "owner or operator" under § 9607(a)(2) for the waste disposal of its subsidiary. The district court in that case had applied an expansive definition of "operator," imposing liability on the parent corporation for exercising control over the subsidiary's business generally, even though it was not directly involved in the waste disposal process. The Sixth Circuit reversed.

This Court, in vacating and remanding, declined to uphold a broad definition of "operator" that strained the term's "ordinary or natural meaning." *Id.* at 66 (internal quotation marks omitted). Rather, after "ru[ing] the uselessness of CERCLA's definition of a facility's 'operator' as any 'person ... operating' the facility ...," *id.*, the Court consulted the dictionary definition and concluded that "an operator is simply someone who directs the workings of, manages or conducts the affairs of a facility." *Id.* To give effect to the ordinary meaning, the Court held that "an operator must manage, direct, or conduct operations *specifically related to pollution*, that is, operations having to do with the leakage or disposal of

hazardous waste, or decisions about compliance with environmental regulations." *Id.* at 66-67 (emphasis added).[6]

As in these precedents, "arranger" liability under § 9607(a)(3), no less than "operator" liability under § 9607(a)(2), should be construed based on the plain and ordinary meaning of its terms "arrange for," "disposal," and "owned or possessed."

B. "Arranged For" Requires Intentional Disposal Of Hazardous Waste.

As the Seventh Circuit held in *Amcast Industrial Corp. v. Detrex Corp.*, 2 F.3d 746 (7th Cir. 1993), the phrase "arranged for" contains "critical words" that "imply intentional action." *Id.* at 751. The dictionary definition of "arrange" is "to make preparations for; plan; ... to bring about an agreement or understanding concerning." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 64 (10th ed. 1995). The preposition "for" is a "function word to indicate purpose" or an "intended goal." *Id.* at 454. Thus, taken together, Congress's use of the phrase "arranged for" before the

[6] *See also United States v. Township of Brighton*, 153 F.3d 307, 314 (6th Cir. 1998) ("The plain meaning of the term 'operator'" requires that the defendant "have performed some affirmative acts" of "actual control" such as directing, managing or conducting affairs before it can be held responsible.); *United States v. Gurley*, 43 F.3d 1188, 1193 (8th Cir. 1994) (ordinary meaning of "operator" connotes "some type of action or affirmative conduct" and requires entity to have both actual authority over the disposal of hazardous materials and to have exercised that control); *Edward Hines Lumber*, 861 F.2d at 156 ("The definition of 'owner or operator' ... must come from a source other than the text. The circularity strongly implies, however, that the statutory terms have their ordinary meanings rather than unusual or technical meanings.").

terms "disposal or treatment" requires the defendant to have intended to dispose of hazardous waste.

This conclusion is reinforced by other terms in § 9607(a)(3). As the Sixth Circuit noted in *United States v. Cello-Foil Products, Inc.*, 100 F.3d 1227 (6th Cir. 1996), "'[o]therwise arranged' is a general term following in a series two specific terms and embraces the concepts similar to those of 'contract' and 'agreement.'" *Id.* at 1231 (quoting Singer, *supra*, § 47.17; *Woods v. Simpson*, 46 F.3d 21, 23 (6th Cir. 1995)). "All of these terms indicate that the court must inquire into what transpired between the parties and what the parties had in mind with regard to disposition of the hazardous substance. Therefore, including an intent requirement into the 'otherwise arranged' concept logically follows the structure of the arranger liability provision." *Cello-Foil*, 100 F.3d at 1231.

Other courts of appeals likewise have held that intent to dispose of hazardous waste is required for arranger liability. *See, e.g., Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 164 (2d Cir. 1999) (requiring evidence that a "transaction includes an 'arrangement' for the ultimate disposal of a hazardous substance" before CERCLA liability will be imposed) (internal quotation marks omitted); *Pneumo Abex Corp. v. High Point, Thomasville & Denton R.R. Co.*, 142 F.3d 769, 775 (4th Cir. 1998) (examining the parties' intent in sale of wheel bearings and concluding that they did not intend to arrange for the disposal of hazardous materials); *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1317 (11th Cir. 1990) ("If a party merely sells a product, without additional evidence that the transaction includes an 'arrangement' for the ultimate disposal of

a hazardous substance, CERCLA liability [will] not be imposed.").

The intent requirement embodied in the phrase "arranged for" is not satisfied where, as here, there is no evidence that Shell intended to do anything more than arrange for the *sale* (not disposal) of a *useful product* (not hazardous waste) and transfer ownership, possession and control before unloading. *See* Pet.App. 85a ("It was Shell's intent that B&B take responsibility for the product when it arrived at B&B's facility. Shell intended that B&B should be responsible for handling D-D after the common carrier tank truck arrived at Arvin."); *id.* at 85a-86a ("Shell sold D-D as a new product. It was not a waste product.").

The Ninth Circuit distorts the plain meaning of "arranged for" by concluding that, since "'*disposal*' includes such unintentional processes as 'leaking,'" "*[a]rranging* for a transaction in which there necessarily would be leakage or some other form of disposal of hazardous substances is sufficient" even absent any intent to dispose. Pet.App. 44a (emphasis added). As Judge Bea's dissent from denial of rehearing *en banc* noted, "[e]ven though the definition of disposal may include unintentional practices, mere 'disposal' does not constitute *arranger* liability," which "connotes an intentional action toward achieving the purpose: disposal ... It is an oxymoron for an entity *unintentionally* to make preparations for disposal." Pet.App. 70a (emphasis added).

On comparable facts in *Amcast*, the Seventh Circuit similarly emphasized the intent of the seller, holding that, "when the shipper is not trying to arrange for the disposal of hazardous waste, but *is arranging for the delivery of a useful product*, he is not a responsi-

ble person," and contrasting the case where a party hires a transporter to dispose of waste and the waste spills en route. 2 F.3d at 751 (emphasis added). Writing for that court, Judge Posner expressly rejected any reading of the terms "leakage" or "spillage" in the definition of "disposal" to include the possibility of unintentional "arrangement" for hazardous waste disposal. Noting that the "same word can mean different things in different sentences," *id.*, he stated that, even if, "[i]n the context of the operator of a hazardous-waste dump, 'disposal' includes accidental spillage," it does not do so "in the context of the shipper who is arranging for the transportation of a product." *Id.* As Judge Posner explained:

> Although the statute defines *disposal* to include spilling, the critical words for present purposes are '*arranged for*.' The words imply intentional action. The only thing that [the defendant] arranged for [a common carrier] to do was to deliver [a chemical] to [a customer's] storage tanks. It did not arrange for spilling the stuff on the ground. No one *arranges* for an accident ....

Id. (emphasis added). In selling a useful product here, Shell was not purposefully arranging for hazardous waste disposal.

C. "Disposal" Is Limited To The Discard Of Hazardous Waste, Not The Delivery Of Useful Products

The phrase "arranged for" does not stand in isolation. Statutory terms are construed in light of their surrounding words. *See, e.g., Rake v. Wade*, 508 U.S. 464, 471 (1993) ("To avoid deny[ing] effect to a part of a statute, we accord significance and effect ...

to every word.") (internal quotation marks omitted); *United States v. CDMG Realty Co.*, 96 F.3d 706,714 (3d Cir. 1996) ("Meaning derives from context, hence the constructional canon *noscitur a sociis*, which states that one may infer meaning by examining the surrounding words."). Here, the surrounding terms reinforce the construction of "arrange for" as requiring the purpose to dispose of hazardous waste.

Section 9607(a)(3) requires that a responsible party arrange for the "disposal" or "treatment" of hazardous waste. By expressly incorporating the SWDA's definition of "disposal," *see* 42 U.S.C. § 9601(29), CERCLA defines "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking, or placing of any ... *hazardous waste* into or on any land ... so that [it] may enter the environment ...." 42 U.S.C. § 6903(34) (emphasis added); *see also Catellus Dev. Corp. v. United States*, 34 F.3d 748, 752 (9th Cir. 1994) (noting that solid waste is defined as any "*discarded* material which is "[a]bandoned ... [r]ecycled ... or ... inherently wastelike") (citing 40 C.F.R. § 261.2(a)(2) (1993) (emphasis added)).

By definition, hazardous waste differs from useful products sold new for consumer use. For this reason, the courts of appeals have repeatedly held that arranger liability may not extend to the sale of useful consumer products. For instance, in *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160 (2d Cir. 1999), the Second Circuit held that unused virgin chemicals that the defendant "would ordinarily use in its laboratories" was not "waste" under CERCLA and thus that their sale could not give rise to arranger liability. *Id.* at 164. The court held that, "[b]ecause the definition of 'disposal' refers to 'waste,' only transactions that involve 'waste' constitute arrangements for

disposal within the meaning of CERCLA." *Id.* (citing *A&W Smelter & Refiners, Inc. v. Clinton*, 146 F.3d 1107, 1112 (9th Cir. 1998) (recognizing the "useful product" defense)).

Likewise, in *AM Int'l*, 982 F.2d 989, the Sixth Circuit held that AM International, which entered into an agreement to sell a manufacturing facility to a realty company, was not liable for the hazardous substances it left in the building. *See id.* at 999. The court held that "[l]iability only attaches to parties that have 'taken an affirmative act to dispose of a hazardous substance ... as opposed to convey a useful substance for a useful purpose.'" *Id.* (quoting *Prudential Ins. Co. v. U.S. Gypsum*, 711 F. Supp. 1244, 1253 (D.N.J. 1989)); *see also Am. Int'l Specialty Lines Ins. Co. v. United States*, 2008 WL 1990859, *16 (Fed. Cl. Jan. 31, 2008) ("If a hazardous substance is not waste but instead is deemed to be a useful product under the statute, liability does not attach."); *Dayton Indep. Sch. Dist. v. U.S. Mineral Prod. Co.*, 906 F.2d 1059, 1065 (5th Cir. 1990) ("[T]he sale of a hazardous substance for a purpose other than its disposal does not expose defendant to CERCLA liability.") (internal quotation marks omitted); *Amcast*, 2 F.3d at 751 (stating that, when a "shipper is not trying to arrange for the disposal of hazardous wastes, but is arranging for the delivery of a useful product, he is not a responsible person within the meaning of [CERCLA] ...").[6]

[6] *See also 3550 Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1362 (9th Cir. 1990) (sale of asbestos building materials is not "disposal" of asbestos under CERCLA); *Jersey City Redevelopment Auth. v. PPG Indus.*, 655 F. Supp. 1257, 1260-61 (D.N.J. 1987) (transfer of hazardous substance is not "disposal" if it involved the sale of a product), *aff'd*, 866 F.2d

In declining to apply this legion of precedents excluding the sale of useful products from the reach of arranger liability, the Ninth Circuit ignored the plain limitation of "disposal" to "waste." *See* John S. Applegate & Jan G. Laitos, ENVIRONMENTAL LAW: RCRA, CERCLA, AND THE MANAGEMENT OF HAZARDOUS WASTE 38 (2006) ("[T]he courts and EPA have uniformly drawn the conclusion that the essence of waste is that something is 'discarded.'")

As the district court expressly found, Shell's useful product D-D, a soil fumigant designed to help farmers protect crop roots from microscopic worms, was not waste. *See* Pet.App. 85a-86a ("Shell sold D-D as a new product. It was not a waste product."); *see also* Applegate & Laitos, *supra*, at 196 (noting that the "useful product" doctrine is most appropriate where the products were sold "not because the seller wanted or intended to rid itself of a hazardous substance, but because the seller intended for the products to satisfy some market demand.").

Moreover, as even the Ninth Circuit acknowledged, any inadvertent spillage that occurred was the result of the transfer of the product from the common carriers to B&B. Pet.App. 5a. Because the focus was on transferring a valuable product for ongoing use, Shell

1411 (3d Cir. 1988); *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 685 F. Supp 651, 654 (N.D. Ill.) (stating that phrase "arranged for disposal or treatment" limits liability "to parties who transact in a hazardous substance in order to dispose of or treat the substance."), *aff'd*, 861 F.2d 1255 (7th Cir. 1988); *United States v. Westinghouse Elec. Corp.*, 1983 WL 160587, *3 (S.D. Ind. June 29, 1983) (stating that, because company "did not generate or dispose of any hazardous waste and did not contract for disposal of waste ...," it is not liable under CERCLA).

cannot be said to have "discarded" or "arranged for" the "discard" of "waste." As the Seventh Circuit stated in *Amcast*, "[t]he words 'arranged with a transporter for disposal or treatment' appear to contemplate a case in which a person or institution that *wants to get rid of* its hazardous waste hires a transportation company to carry them to a disposal site." 2 F.3d at 751 (emphasis added). By contrast, that court noted, a manufacturer that arranged for the delivery of a useful chemical to a customer's storage tank "did *not* arrange for spilling the stuff on the ground." *Id.* (emphasis added); *see also* Applegate & Laitos, *supra*, at 196 ("If a product has little or no remaining value for its original purpose, and it contains a hazardous substance, its sale is likely to be seen as an 'arrangement for disposal,' which creates CERCLA liability."). In short, there is no basis to conclude that Shell's sale of D-D falls within the definition of "disposal" of "hazardous waste."[7]

[7] Further evidence that Congress did not intend for manufacturers of useful products to be held liable as arrangers by virtue of merely selling and shipping those products is found in CERCLA's Superfund provisions. Congress imposed upon manufacturers, producers and importers of specified chemicals a share of CERCLA-related cleanup costs by taxing them to contribute to the Superfund. *See* CERCLA, Pub. L. No. 96-510, § 211, 94 Stat. at 2797 (amending the Internal Revenue Code to provide for the taxation of specified "taxable chemicals" at specified rates). The tax on specified chemicals remained even though Congress added a general corporate tax as an additional means of financing the Superfund in the 1986 Amendments to CERCLA. *See* Superfund Amendments & Reauthorization Act of 1986, Pub. L. No. 99-499, §§ 501-515, 100 Stat. 1613, 1760-71 (1986). By contrast, Congress omitted mention of manufacturers of taxable chemicals in listing the several categories of PRPs. In light of the express inclusion of manufacturers of useful products in the Superfund tax provisions, the omission

D. The Terms "Owned or Possessed" Further Limit Arranger Liability And At A Minimum Require Actual Control

The imposition of arranger liability is further constrained by the language in § 9607(a)(3) requiring that the entity arranging for disposal of the hazardous waste "own[] or possess[]" that substance. Given that Shell transferred ownership of D-D shipments to B&B upon arrival at the Arvin site, Shell did not own D-D at the time of any supposed disposal. *See* Pet.App. 85a (Shell intended that B&B "take responsibility for the product when it arrived at B&B's facility."); *id.* at 73a (Bea, J., dissenting from denial of rehearing *en banc*). And it was not sufficient, as the panel suggested, that "Shell here owned the chemicals at the time *the sale* was entered into." Pet.App. 49a (emphasis added). Nothing in the language of § 9607(a)(3) supports such a narrowing construction of the terms "owned or possessed."

At a minimum, the courts of appeals have reasoned that *actual control* of hazardous substances at the time of disposal is critical to satisfy the "ownership or possession" requirement of the statutory scheme. The Ninth Circuit's departure from even the minimum requirement of "actual control" runs contrary to this precedent. In *United States v. Shell Oil Co.*, 294 F.3d 1045 (9th Cir. 2002), for example, the Ninth Circuit itself held that "control is a crucial element," *id.* at 1055, of arranger liability: "'[i]t is the authority to control the handling and disposal of hazardous substances that is critical under the statutory scheme.'" *Id.* at 1056 (quoting *United States v. Ne.*

of manufacturers from the PRP list is telling; *expressio unius exclusio alterius est*.

Pharm. & Chem. Co. ("*NEPACCO*"), 810 F.2d 726, 743 (8th Cir. 1986)); *see also Gen. Elec. Co. v. AAMCO Transmissions, Inc.*, 962 F.2d 281, 286 (2d Cir. 1992) ("[I]t is the obligation to exercise control over hazardous waste, and not the mere ability or opportunity to control the disposal of hazardous substances that makes an entity an arranger under CERCLA's liability provision.") (emphasis omitted).

Similarly, as the court stated in *United States v. Iron Mountain Mines, Inc.*, 881 F. Supp. 1432 (E.D. Cal. 1995), "[n]o court has imposed arranger liability on a party who never owned or possessed, and never had any authority to control or duty to dispose of, the hazardous materials at issue." *Id.* at 1451. As the Second Circuit concluded in *AAMCO*, which held that oil company defendants were not arrangers for disposal of their service station tenants' waste oil, Congress "employed traditional notions of duty and obligation in deciding which entities would be liable under CERCLA, as arrangers." 962 F.2d at 286. Thus, as the court in *AAMCO* also noted, "[a]lmost all of the courts that have held defendants liable as arrangers have found that the defendant had some actual involvement in the decision to dispose of waste." *Id.* Finding liability in the absence of any ownership, possession *or* control departs from all such traditional notions.

In short, contrary to the Ninth Circuit's decision, to hold a party responsible as an arranger, it must have "some obligation to arrange for or direct . . . disposal." *AAMCO*, 962 F.2d at 286 (citing *CPC Int'l, Inc. v. Aerojet-General Corp.*, 759 F. Supp 1269, 1278 (W.D. Mich. 1991) ("The nexus issue is not a test of whether a party created or left hazardous substances or had title to them, but rather whether the party *assumed*

responsibility for determining their fate") (emphasis added)); *United States v. A & F Materials Co.*, 582 F. Supp. 842, 845 (S.D. Ill. 1984) (liability "ends with the party who both owned the hazardous waste and made the crucial decision how it would be disposed of or treated, and by whom.").

E. Under The Plain Language Of CERCLA, Shell Clearly Did Not "Arrange for the Disposal" Of Hazardous Waste

Taking all of the relevant terms in § 9607(a)(3) together in light of their plain meaning, arranger liability may not be imposed where Shell did not intentionally arrange for the disposal of hazardous waste but merely sold a useful product, and did not have ownership, possession or control of the D-D when spilled. There is no evidence that Shell intentionally made plans to dispose of hazardous materials; to the contrary, the product Shell sold a soil fumigant to protect crop roots was a useful product designed to serve a market demand, not "waste" it sought to discard. Pet.App. 85a-86a. And under the terms of its contract with Shell, B&B assumed ownership, possession and control of the product as soon as the common carrier trucks entered B&B's premises and before transfer of the product to B&B's storage tanks. Pet.App. 85a; J.A. 583 ("Buyer ... shall unload each delivery promptly and at buyer's own risk and expense ..."); *see also* J.A. 264-65 (Shell intended B&B to take "stewardship [of product] upon the common carrier arriving at [its] facility").

Attempting to equate foreseeability with control, the Ninth Circuit asserts that Shell is liable under § 9607(a)(3) because:

> (1) [D-D] [s]pills occurred *every time* the deliveries were made; (2) Shell arranged for delivery and chose the common carrier that transported its product to the Arvin site; (3) Shell changed its delivery process so as to require the use of large storage tanks, thus necessitating the transfer of large quantities of chemicals and causing leakage from corrosion of the large steel tanks; (4) Shell provided a rebate for improvements in B&B's bulk handling and safety facilities and required an inspection by a qualified engineer; (5) Shell regularly would reduce the purchase price of the D-D, in an amount the district court concluded was linked to loss from leakage; and (6) Shell distributed a manual and created a checklist of the manual requirements to ensure that D-D tanks were being operated in accordance with Shell's safety instructions.

Pet.App. 47a.[8]

These cobbled-together factors in no way support an inference of actual control sufficient to constitute

[8] The Ninth Circuit's additional suggestion that leakage was an "inherent part of" the delivery process is unavailing. Unlike in "formulator" cases like *United States v. Aceto Agric. Chems. Corp.*, 872 F.2d 1373 (8th Cir. 1989) (arranger liability attaches), Shell never sent its own products out for round-trip processing where "inherent in the process" of manufacturing "is the generation of wastes." *Id.* at 1383. In *Aceto*, as in other formulator cases, the defendant retained ownership, possession and control while waste was generated. Moreover, in those cases the waste was generated in furtherance of the owners' business purpose.

an "arrangement for disposal" and in any event misstate the record. For example, the "shrinkage" allowance, while called by various names, was never a "spillage" or "leakage" allowance (factor 5). The district court found that "the various names given a 'sales allowance' were simply euphemisms for a discount to protect the list price of a product, and that whatever the name of the allowance, whether 'evaporation allowance, promotional allowance, or competition allowance,' the purpose was to give a price discount to meet competition." Pet.App. 119a-120a (emphasis added); *see also* J.A. 412-39 (indicating "evaporation allowance" present in only 11 Shell invoices during two-week period in 1978). There was no evidence that Shell ever afforded its customer a monetary allowance for spilled products.

Nor does knowledge of small spills (factor 1) equate to constructive control over the disposal of hazardous waste. Because D-D is a volatile chemical that normally vaporizes when it is applied in the soil, drips and small spills of D-D do not amount to environmental contamination in themselves. Pet.App. 95a-98a. Significantly, the EPA's own remedial investigation found no contamination at the tank area where the unloading occurred. J.A. 602. The evidence showed that the contamination at B&B's site occurred as a result of B&B's use of an unlined sump, which was connected to a pond, to collect rinsewater that later penetrated ground water tables not because of the spillage of small quantities of D-D while B&B unloaded deliveries and transferred the chemical from the common carrier tank trunks into B&B's bulk storage tanks. Pet.App. 100a-101a, 122a, 184a, 251a. Indeed, the theory of liability was that rainwater (far from abundant in Central California) washed the spills during bulk unloading into the

pond. Pet.App. 94a-98a, 254a; *see also* J.A. 598-99 (stating that dinoseb not D-D was only contaminant in surface soils of concern to the EPA). Thus, equating spills with "waste" here is simplistic and inadequate to support an inference of control over "waste" disposal.

Finally, Shell should not be penalized through imposition of arranger liability for providing its customers with a safety manual and other information for the safe handling and use of its product (factor 6). Pet.App. 47a; *see also* J.A. 511-78 (Shell safety manual and guidelines for D-D). Under the panel's logic, the more engaged a company becomes in promoting safety standards required by law, the greater the likelihood that it will face arranger liability under CERCLA. Such a result would discourage such safety efforts, creating a moral hazard that conflicts with the central purposes of CERCLA. *See, e.g., Jordan v. S. Wood Piedmont Co.*, 805 F. Supp. 1575, 1580 (S.D. Ga. 1992) ("[T]he imposition of liability upon a manufacturer on account of its dissemination of safety-related information is anathematic, even to the broad and salutary remedial purposes of CERCLA."); *R.R. Street & Co. v. Pilgrim Enters. Inc.*, 166 S.W.3d 232, 246 (Tex. 2005) (noting the "valid concerns that imposing arranger liability on chemical manufacturers and suppliers for providing technical services and advice will have the adverse effect of discouraging these companies from providing valuable advice to customers regarding the safe use and handling of their products"). Congress surely did not intend such a perverse result in passing a statute designed to enhance protection of the environment.

II. THE DECISION BELOW ADOPTED AN APPORTIONMENT STANDARD THAT, CONTRARY TO CONGRESSIONAL INTENT, AMOUNTS TO MANDATORY JOINT AND SEVERAL LIABILITY

By holding Shell 100% jointly and severally liable, the Ninth Circuit rejected the district court's ruling, supported by extensive factual findings based on direct evidence at trial, setting Shell's proportion of liability conservatively at 6% at most. In so doing, the Ninth Circuit adopted an apportionment standard that imposes a burden on CERCLA defendants that is nearly impossible to satisfy as a practical matter, and that has no support in CERCLA's language, its legislative history, or nearly thirty years of case law.

A. Congress Rejected Mandatory Joint And Several Liability And Endorsed Application Of Common Law Principles

CERCLA as ultimately enacted is silent as to the availability of joint and several liability. Its legislative history, however, makes clear the view of members of Congress that, while such liability is available, it is not mandatory.[9] As the Ninety-sixth Congress drew to a close in 1980, the House and the Senate each considered bills to create liability schemes for costs associated with the removal and remediation of hazardous waste. Both bills initially contained explicit provisions concerning joint and several liability with respect to cost recovery. *See* S. 1480, 96th Cong., 2d Sess. § 4(a), 126 CONG. REC.

[9] This Court has not resolved the availability of joint and several liability under CERCLA but last Term assumed without deciding that such liability is available. *See United States v. Atlantic Research Corp.*, 127 S. Ct. 2331, 2339 n.7 (2007).

30,908; H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(1)(D), 126 CONG. REC. 26,779. While the House bill expressly permitted apportionment in certain instances, *see* H.R. 7020, 96th Cong., 2d Sess. § 3071(a)(3), 126 CONG. REC. 26,779, the Senate bill required joint and several liability subject to limited defenses, *see* S. 1480, 96th Cong., 2d Sess. § 4(a), 126 CONG. REC. 30,908.

The compromise legislation that was enacted, however, removed from the cost recovery section all references to joint and several liability, as well as to apportionment. *See* 42 U.S.C. § 9607(a) (cost recovery section). Nevertheless, members of Congress expressing their support for the legislation made clear their view that joint and several liability remains available under CERCLA to the extent that it is consistent with the common law.[10] For example, Senator Randolph, chairman of the Committee on Environment and Public Works and floor manager of the bill, stated during the floor debate:

> We have kept strict liability in the compromise, specifying the standard of liability under section 311 of the Clean Water Act, *but we have deleted any reference to joint and several liability, relying on common law principles to determine when parties should be severally liable.* ... It is intended that issues of liability not resolved by this act, if any, shall be governed by *traditional and*

[10] Given the hurried nature of CERCLA's passage during a lame-duck Congress, there is no committee report for the compromise bill. The statements of CERCLA's sponsors, while not controlling, are entitled to substantial weight when interpreting the statute. *See, e.g., N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 526-27 (1982); *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976).

> *evolving principles of common law*. An example is joint and several liability. Any reference to these terms has been deleted, and the liability of joint tortfeasors will be determined under common or previous statutory law.

126 CONG. REC. S14,964 (statement of Sen. Randolph) (emphasis added).[11] Similarly, Representative Florio explained:

> As originally passed, H.R. 7020 provided for joint and several liability, but qualified that standard with two statutory apportionment provisions which modified the applicability of such a standard. ... Rather than announce the standard, and then cut back on its applicability, this bill refers to section 311 of the Clean Water Act and *to traditional and evolving principles of common law in determining the liability of such joint tortfeasors*. To insure the development of a uniform rule of law, and to discourage business[es] dealing in hazardous substances from locating primarily in States with more lenient laws, the bill will encourage the further development of a Federal common law in this area.

126 CONG. REC. H11,787 (statement of Rep. Florio) (emphasis added).[12]

[11] *See also* 126 CONG. REC. H11,789 (statement of Rep. Jeffords) ("Although the Senate version does not contain the House language on the question of joint and several liability, *the intent of the House provisions will largely be served through the prevailing common law rules relating to apportionment* among [sic] defendants who are held jointly and severally liable.") (emphasis added).

[12] CERCLA's definitional section states that the "terms 'liable' or 'liability' under this subchapter shall be construed to be the standard of liability which obtains under section 1321 of Title

Less than three years after CERCLA's enactment, a federal district court issued what has become the seminal decision with respect to the scope of CERCLA liability. *See United States v. Chem-Dyne Corp.*, 572 F. Supp. 802 (S.D. Ohio 1983). After surveying the legislative history, the court concluded that:

> *[T]he scope of liability and term joint and several liability were deleted to avoid a mandatory legislative standard* applicable in all situations which might produce inequitable results in some cases. The deletion was not intended as a rejection of joint and several liability. Rather, *the term was omitted in order to have the scope of liability determined under common law principles,* where a court performing a case by case evaluation of the complex factual scenarios associated with multiple-generator waste sites will assess the propriety of applying joint and several liability on an individual basis.

Id. at 808 (internal citations omitted) (emphasis added). Concluding that the "rights, liabilities, and responsibilities of the United States under 42 U.S.C. § 9607 are governed by a federal rule of decision," *id.*

33," which is section 311 of the Clean Water Act. 42 U.S.C. § 9601(32). This cross-reference was designed to ensure that CERCLA is a strict liability statute. *See, e.g.*, 126 CONG. REC. S14,964 (statement of Sen. Randolph); 126 CONG. REC. H11,789 (statement of Rep. Jeffords); *see also infra* at 36 (quoting H.R. REP. NO. 99-253(I), at 74 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836). Additionally, at the time of CERCLA's enactment, the Department of Justice interpreted the Clean Water Act to provide joint and several liability where a harm is indivisible. *See* 126 CONG. REC. H11,787 (letter from Assistant Attorney General Alan Parker).

at 809, the court looked to the Restatement (Second) of Torts to determine when, in lieu of joint and several liability, liability should be apportioned among multiple tortfeasors, *id.* at 810 (citing RESTATEMENT (SECOND) OF TORTS §§ 433A, 433B, 875, 881 (1965 & 1976)).

In 1986, Congress enacted the Superfund Amendments and Reauthorization Act, Pub. L. No. 99-499, 100 Stat. 1613, but did not modify CERCLA's standard of liability. The House Report, however, did expressly endorse the court's approach in *Chem-Dyne*, while emphasizing the importance of a uniform, national standard:

> Explicit mention of joint and several liability was deleted from CERCLA in 1980 to allow courts to establish the scope of liability through a case-by-case application of 'traditional and evolving principles of common law' and pre-existing statutory law. The courts have made substantial progress in doing so. The Committee fully subscribes to the reasoning of the court in the seminal case of *United States v. Chem-Dyne Corporation*, 572 F. Supp. 802 (S.D. Ohio 1983), which established a uniform federal rule allowing for joint and several liability in appropriate CERCLA cases. ...
>
> The Committee believes that this uniform federal rule on joint and several liability is correct and should be followed. It is unnecessary and would be undesirable for Congress to modify this uniform rule.

H.R. REP. NO. 99-253(I), at 74, *reprinted in* 1986 U.S.C.C.A.N. 2835, 2836.

In light of this legislative history, the Restatement (Second) of Torts has become "[t]he universal starting point for divisibility of harm analyses in CERCLA cases." *Hercules*, 247 F.3d at 717; *see also Township of Brighton*, 153 F.3d at 317-18 & n.14; *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 895, 902 (5th Cir. 1993). Maintaining the uniformity of this approach among the federal circuits is important to ensure that CERCLA's national policies are effectuated.[13]

B. The Restatement Requires Only A Reasonable Basis For Apportioning Liability

The Restatement (Second) of Torts provides that "[d]amages for harm are to be apportioned among two or more causes where (a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." RESTATEMENT (SECOND) OF TORTS § 433A (emphasis added). *Accord id.* § 881. These principles apply even when the burden of demonstrating divisibility is on the party seeking to avoid joint and several liability. *See* RESTATEMENT (SECOND) OF TORTS

[13] While this Court has long held that "[t]here is no federal *general* common law," *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (emphasis added), it has also sanctioned the use of a federal rule of decision "where there is a 'significant conflict between some federal policy or interest and the use of state law.'" *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 87 (1994) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Here, however, there is not even any state law to displace, since, as the decision below correctly concluded, "the reach of CERCLA liability is *sui generis*." Pet App. 15a-16a n.17. Moreover, the House committee report supporting the 1986 CERCLA amendments specifically urged the federal courts to rely on uniform common law when determining the scope of liability under CERCLA. *See supra* at 36.

§ 433B(2); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt. h (2000). This analysis is "intensely factual" and reflects Congress's intent in enacting CERCLA that "there must be some reason for the imposition of CERCLA liability." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 269-70 (3d Cir. 1992); *see also Hercules*, 247 F.3d at 716-17 ("[T]he divisibility doctrine ... [is] both compatible with the text and the overall statutory scheme of CERCLA and [is] a sensible way to avoid imposing on parties excessive liability for harm that is not fairly attributable to them.").

Commentary to the Restatement makes clear that a "reasonable basis" for apportionment may rest upon a practical approximation or estimate grounded in objective evidence and reasonable assumptions; it does not depend upon absolute precision, certainty or documentation. For example, according to the Restatement, "where the cattle of two or more owners trespass upon the plaintiff's land and destroy his crop," the damage should "be apportioned among the owners of the cattle, on the basis of the number owned by each, and the reasonable assumption that the respective harm done is proportionate to that number." RESTATEMENT (SECOND) OF TORTS § 433A cmt. d. The same principles apply "where the pollution of a stream, or flooding, or smoke or dust or noise, from different sources, has interfered with the plaintiff's use or enjoyment of his land." *Id.* Thus, under the Restatement standard, apportionment is appropriate even where the precise extent of harm caused by each party is unknown. *Cf.* RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 26 cmt f ("The fact that the magnitude of each indivisible component part cannot be determined with precision does not mean that damages are indivisible.

All that is required is a reasonable basis for dividing the damages.").

In contrast to the decision below, other courts of appeals have applied these Restatement principles in CERCLA cost recovery actions to allow division of fault at the liability stage to be guided by reasonable estimates. The Fifth Circuit, for example, has held that "a rough approximation is all that is required under the Restatement [(Second) of Torts]." *Bell Petroleum*, 3 F.3d at 904 n.19 (emphasis added). Thus, that court explained, where there is

> a factual basis for making a reasonable estimate that will fairly apportion liability, joint and several liability should not be imposed in the absence of exceptional circumstances. The fact that apportionment may be difficult, because each defendant's exact contribution to the harm cannot be proved to an absolute certainty, or the fact that it will require weighing the evidence and making credibility determinations, are inadequate grounds upon which to impose joint and several liability.

Bell Petroleum, 3 F.3d at 903.[14] Similarly, in *Township of Brighton*, the Sixth Circuit, while cautioning against simply splitting the difference, held that there need only be a "reasonably ascertainable" basis

[14] Analogizing to the Restatement's cattle and stream pollution examples, the Fifth Circuit concluded that the district court erred by imposing joint and several liability because, even though the district court could not determine with absolute certainty the amount of chromium each defendant introduced into the groundwater, expert testimony provided a reasonable basis for apportioning on a volumetric basis. *Bell Petroleum*, 3 F.3d at 903-04.

for apportionment. 153 F.3d at 320.[15] And in *Hercules*, the Eighth Circuit recognized that "[a] defendant need not prove that its 'waste did not, or could not, contribute' to any of the harm at a CERCLA site ... because it is also possible to prove divisibility of single harms based on volumetric, chronological, or other types of harm." 247 F.3d at 719;[16] *see also Coeur D'Alene Tribe v. Asarco Inc.*, 280 F. Supp. 2d 1094, 1120 (D. Idaho 2003) (apportioning liability "[e]ven though the exact percentages of lead, cadmium and zinc in the tailings from each mill is unknown," "estimating releases is not an exact science," and "volumetric calculations may not be the 'perfect' method of divisibility" because "there is a reasonable relationship between the waste volume, the release of hazardous substances and the harm at the site").

Courts of appeals have interpreted the Restatement standard as permitting reasonable estimates in other analogous contexts. For example, in *Sauer v. Burlington Northern Railroad Co.*, 106 F.3d 1490 (10th Cir. 1997), the Tenth Circuit affirmed a district court's apportionment of injuries between a plaintiff's preexisting condition and a defendant's negligence in an action under the Federal Employers' Liability Act ("FELA"), because apportionment "need not be proved

[15] The Sixth Circuit vacated the district court's imposition of joint and several liability and remanded so that it could consider apportioning liability based on a geographic, volumetric, and/or temporal basis. *Township of Brighton*, 153 F.3d at 319-20.

[16] To the extent that the Eighth Circuit would require "concrete and specific" evidence in support of any apportionment, *Hercules*, 247 F.3d at 718, such a rule is inconsistent with the Restatement and the illustrations provided therein. *See supra* at 37-38.

with mathematical precision or great exactitude. The evidence need only be sufficient to permit a *rough practical apportionment.*" *Id.* at 1494 (emphasis added); *see also Zarow-Smith v. N.J. Transit Rail Operations, Inc.*, 953 F. Supp. 581, 589 (D.N.J. 1997) (ruling, in a FELA case, that where "a factual basis exists, it is preferable in the interest of fairness to permit some rough apportionment of damages rather than to hold the defendant entirely liable for a harm that was inflicted by several causes"). Similarly, in *Federal Savings & Loan Insurance Corp. v. Reeves*, 816 F.2d 130 (4th Cir. 1987), the Fourth Circuit declined to disturb a jury's apportionment of liability between former officers and directors and a savings and loan association for fraud, breach of contract, and breach of fiduciary duty because, "'[w]here a factual basis can be found for some rough practical apportionment, ... it is likely that the apportionment will be made.'" *Id.* at 136 (quoting W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS, § 52 (5th ed. 1984)). *Cf. Campoine v. Soden*, 695 A.2d 1364, 1375 (N.J. 1997) ("The absence of conclusive evidence concerning allocation of damages will not preclude apportionment by the jury, but will necessarily result in a less precise allocation than that afforded by a clearer record."); *Loui v. Oakley*, 438 P.2d 393, 397 (Haw. 1968) (approving a "rough apportionment").

Faithful application of the Restatement's apportionment standard is particularly appropriate in the CERCLA context. *First*, faithful application is true to CERCLA's purpose as a "remedial rather than retributive" statute. Lauren E. Passmore, *Reintroducing Equal Treatment In The 'Toxic' Litigation Arena: An Exploration Of The Factors Courts Utilize To Divide The Costs Of Environmental Remediation*, 79 CORNELL L. REV. 1682, 1698 (1994). Indeed, pre-

serving divisibility where a reasonable basis exists is particularly appropriate given CERCLA's otherwise strict nature. As *Bell Petroleum* explains:

> [L]iability is imposed upon entities for conduct predating the enactment of CERCLA, and even for conduct that was not illegal, unethical, or immoral at the time it occurred. ... CERCLA, as a strict liability statute that will not listen to pleas of 'no fault,' can be terribly unfair in certain instances in which parties may be required to pay huge amounts for damages to which their acts did not contribute. Congress recognized such possibilities and left it to the courts to fashion some rules that will, in appropriate instances, ameliorate this harshness.

Bell Petroleum, 3 F.3d at 897; *see also id.* at 902 n.14 ("Under CERCLA's strict liability scheme, the deck of legal cards is heavily stacked in favor of the government."); *United States v. Wade*, 577 F. Supp. 1326, 1339 (E.D. Pa. 1983) (Restatement approach helps to "ameliorate the harshness of the liability provisions of the statute").

Second, the foundation for the imposition of joint and several liability protecting the innocent victim at the expense of a culpable party is not truly applicable in government cost recovery actions. As commentators have explained, where the government seeks recovery from CERCLA defendants, the equities underlying joint and several liability are far different than in traditional tort cases. *See, e.g.*, Jerry L. Anderson, *The Hazardous Waste Land*, 13 VA. ENV. L.J. 1, 29 (1993) ("The 'innocent plaintiff' rationale, the cornerstone of joint and several liability, does not justify using that approach in most CERCLA cases. Unlike typical tort cases, CERCLA

cases do not present a clear-cut choice between an innocent, victimized, impoverished plaintiff and a wrongdoing defendant. Thus, the relative culpability of the parties does not warrant placing the burden of the orphan share entirely on the shoulders of the defendants."). Moreover, using the "taxpayer" as a surrogate for the innocent victim ignores that the taxpayers in this instance are the manufacturers too.

Third, CERCLA's significant deviations from the common law *e.g.*, retroactive liability, liability without traditional causation, and limitations on contribution actions—further counsel against a nearly mandatory application of joint and several liability. *See, e.g.*, Lynda J. Oswald, *New Directions in Joint & Several Liability Under CERCLA?*, 28 U.C. DAVIS L. REV. 299, 361-62 (1995) ("Underlying the entire body of joint and several liability jurisprudence is the recognition that any inequity resulting from holding a single defendant liable for the entire harm to a plaintiff may be corrected in contribution proceedings, where equitable factors can be taken into consideration ...."). Unlike in other settings where joint and several liability is imposed, the right of contribution in CERCLA actions "is not a complete panacea since it frequently will be difficult for defendants to locate a sufficient number of additional, solvent parties ... [and] there are significant transaction costs involved in bringing other responsible parties to court." *O'Neil v. Picillo*, 883 F.2d 176, 179 (1st Cir. 1989); *see also* 42 U.S.C. § 9613(f)(2) (providing that a defendant that has settled its liability to the United States or a State "shall not be liable for claims for contribution regarding matters addressed in the settlement"). Thus, faithful application of the Restatement's apportionment standard is warranted so that a CERCLA action is

not "a black hole that indiscriminately devours all who come near it." Anderson, *supra*, 13 VA. ENV. L.J. at 6-7.

C. The District Court Had A Reasonable Basis For Apportioning To Shell At Most 6% Of The Liability

Applying the Restatement's apportionment standard, the district court determined Shell's maximum volumetric contribution to the harm by comparing its calculation of the amount of D-D spilled during the bulk unloading process the only spillage for which it concluded Shell had operational control (Pet.App. 259a) to the total amount of D-D spilled.[17] These calculations of relative contributions to spills from various sources are supported by ample evidence in the record.

With respect to Shell's share of the D-D spillage, the district court first concluded that three gallons represented a fair estimate of the amount of D-D spilled during each bulk delivery. Pet.App. 257a. While there was no way to measure precisely the spills that occurred, the district court's finding is supported by testimony from several eyewitnesses, one who testified that the spills varied from "a few cupfuls" to "a 5-gallon bucket," J.A. 125, and another

[17] The district court's calculations assume that *all* of the D-D spilled during bulk unloading reached the pond via rainwater and therefore contributed to the contamination. Pet.App. 94a-98a, 254a, 256a-260a. *But see* J.A. 280-82 (Shell's expert, John Connor, discussing unlikelihood of D-D from bulk unloading reaching pond—and thus groundwater—prior to evaporation or absorption in the soil). Indeed, the district court acknowledged that its calculations reflected Shell's "maximum contribution" to the harm. Pet.App. 241a.

who testified that each spill amounted to no more than a gallon, J.A. 208.

The district court next concluded that Shell made, via common carrier, 27 deliveries of D-D each year to B&B for 23 years, resulting in 1,863 gallons of spilled D-D. Pet.App. 256a-257a. This finding is supported by contemporaneous evidence that, for the six years of annual aggregate figures in the trial record, Shell's average annual sales of D-D to B&B was 122,390 gallons. *E.g.*, J.A. 441-473, *cited in* Pet.App. 85a.[18] To determine the number of deliveries per year, the court calculated the capacity of the common carrier trucks as 4,500 gallons based on the average of two witnesses' testimony,[19] and then divided 122,390 gallons by 4,500 gallons, to yield 27 deliveries. This figure was consistent with unrebutted testimony from a B&B employee that the company received "25 loads a year." J.A. 230. The district court then calculated the total D-D spillage during bulk unloading as: 27 deliveries/year x 3 gallons x 23 years = 1,863 gallons.

The district court next calculated the amount of D-D that was spilled by B&B at times other than bulk unloading, and thus for which Shell was not responsi-

[18] Although not introduced as evidence at trial, a summary of Shell's D-D sales to B&B was part of the summary judgment record. *See* U.S. Supplemental Excerpts of Record 1019 (CA9 No. 03-17125, Dkt. Entry 43). This summary indicates that Shell's average annual sales of D-D to B&B from (excluding 1984, as the district court did, Pet.App. 256a-257a) was approximately 103,000 gallons similar to, *but less than*, the district court's calculation.

[19] One witness testified that the common carrier trucks had a 5,000-capacity, while another witness testified that they had a 4,000-gallon capacity. J.A. 230, 267, *cited in* Pet.App. 257a.

ble. Pet.App. 257a-259a. The district court identified five sources of additional D-D spills. *First*, the district court concluded that 168 gallons of D-D spilled during transfer from bulk storage tanks to bobtail trucks.[20] Pet.App. 257a-258a. The district court reached this finding by dividing 73,385 gallons, which it estimated to be the amount of D-D that the bobtails had carried annually (60% of the total D-D amount purchased annually),[21] by the 1900-gallon capacity of the bobtail trucks (J.A. 79-80), yielding 39 bobtail loads per year. Based on eyewitness testimony (J.A. 125, 208), the district court estimated that, on average, 3 cups of D-D spilled during each transfer. The district court then calculated the total D-D spillage during transfer from bulk storage to the bobtail trucks: 39 bobtail loads/year x 3 cups x 23 years = 2,691 cups = 168 gallons.

Second, the district court concluded that 4,709 gallons of D-D was spilled when the bobtail trucks were washed out. Pet.App. 258a. The district court reached this finding after concluding that, on average, 7.5 gallons remained in the bobtail trucks after each use,[22] and that the bobtail trucks were washed

[20] Bobtail trucks were used to transport D-D over the roads to the nurse tanks, which were four-wheel mobile tanks. Pet.App. 257a.

[21] The district court assumed that 60% of the bulk D-D was transferred to the bobtail trucks and 40% was transferred to the D-D rigs based on the volume of the respective tanks and the use of the equipment. Pet.App. 86a-88a, 257a, 259a.

[22] The unrebutted testimony indicated that "5 to 10 gallons, sometimes 20 gallons" remained in the bobtail trucks and could not be pumped out. J.A. 132.

after 70% of the loads.[23] Thus, 39 bobtail loads/year x .70 x 7.5 gallons x 23 years = 4,709 gallons.

Third, the district court concluded that 138 gallons of D-D spilled when the D-D nurse tanks filters were checked prior to use.[24] Pet.App. 258a. The district court reached this conclusion by taking the 73,378 gallons that would have been transferred from the bobtail trucks to the nurse tanks annually and dividing that by the 2300-gallon capacity of the tanks (Pet.App. 87a; J.A. 79, 140), which yielded 32 annual nurse tank loads. Based on eyewitness testimony (Pet.App. 88a; J.A. 85, 140-41, 233), the district court estimated that, on average, 3 cups of D-D spilled during each filter check. Thus, 32 loads/year x 3 cups x 23 years = 2,208 cups = 138 gallons.

Fourth, the district court concluded that 3,864 gallons of D-D spilled when B&B employees rinsed out nurse tanks at the wash rack. Pet.App. 258a-259a. The district court reached this conclusion by assuming that the nurse tanks were washed at the same rate as the bobtail trucks, *i.e.*, 70% of the time, and that, like the bobtail trucks, the nurse tanks retained, on average, 7.5 gallons of D-D prior to each

[23] The unrebutted testimony indicated that the tanks were washed unless B&B was going to "continue reloading" or "unless they're going right back out on the job." J.A. 132, 140. "If we had a lot of D-D going out, it would continue reloading and going. If that particular truck had to change over to a different ... chemical, it would rinse out." J.A. 132; *see also* Pet.App. 108a.

[24] Nurse tanks were not filled on site because California highway regulations required them to be towed empty, J.A. 140, and therefore the district court did not find any spills during the loading of those tanks.

wash.[25] Thus, 32 loads/year x .7 x 7.5 gallons x 23 years = 3,864 gallons.

Fifth, and finally, the district court concluded that 20,470 gallons of D-D spilled when filters were checked on D-D rigs.[26] Pet.App. 259a. The district court reached this conclusion by dividing 48,924 gallons, which it estimated to be the amount of D-D that the rigs had carried annually (40% of the total D-D amount purchased annually), *see supra* at 46 n.21, by the 550-gallon average capacity of the D-D rigs (J.A. 81, 142), yielding 89 loads per year. It also relied on uncontroverted testimony (Pet.App. 86a-87a; J.A. 84, 168-69), that the filters were checked 20 times per month for 4 months each year, *i.e.*, 80 times per year, and based on still other testimony (Pet.App. 86a; J.A. 85, 140-41, 233), estimated that, on average, 2 cups of D-D spilled during each filter check. Thus, 89 loads/year x 2 cups x 80 checks/year x 23 years = 327,520 cups = 20,470 gallons.

Taking the D-D spills it concluded had occurred as a result of the bulk deliveries (1,863 gallons) and dividing that amount by the total amount of D-D spilled (31,212 gallons), the district court concluded that Shell was responsible for approximately 6% of the D-D spills. Pet.App. 260a. Thus, the district court's calculations, while necessarily practical estimates rather than precise recordings, are based on substantial evidence in the record, and therefore

[25] The unrebutted testimony indicated that the nurse tanks were rinsed out at wash racks "unless they were going right back out on a job." J.A. 85.

[26] D-D rigs were 500-600 gallon tanks mounted on two-wheeler trailers. Pet.App. 86a; J.A. 81, 142. Unlike the bobtail trucks and the nurse tanks, the D-D rigs were not rinsed. J.A. 85.

provide a reasonable basis for apportionment under the Restatement. *Cf. Dent v. Beazer Materials & Servs., Inc.*, 156 F.3d 523, 530-31 (4th Cir. 1998) (upholding district court's apportionment because "the critical findings of fact underlying [it] ... [are] amply supported by the evidence and [are] not, therefore, clearly erroneous").

D. In Disregarding The District Court's Detailed Factual Findings In Support Of Apportionment, The Decision Below Imposes Requirements Well Beyond The Restatement's

Because Shell is responsible at most for a small fraction of the D-D spilled at the site, it makes little sense to hold it 100% jointly and severally liable, as the Ninth Circuit panel decision does. While conceding that the district court correctly found the harm here capable of apportionment, the panel held that the district court erred in apportioning Shell 6% of the liability. Pet.App. 29a-30a, 37a-41a. Purporting to apply the deferential clearly erroneous standard, the panel did not reject any of the district court's detailed factual findings. The panel likewise acknowledged that "Shell's contribution to the contamination of the Arvin site is easier to isolate than that of the Railroads', as it involved ascertainable pollutants entering the soil in a specific way." Pet.App. 37a. The panel nonetheless reached the "legal determination" (Pet.App. 28a) that those detailed factual findings concerning ascertainable pollutants were insufficient to meet Shell's burden of proof, and therefore held that Shell had not satisfied its burden. Pet.App. 39a-41a.[27]

[27] The Circuits are not in agreement as to the proper standard

In so holding, the Ninth Circuit merely paid "lip-service to the Restatement test" and "effectively ... disregard[ed] it" by creating a practically impossible burden for parties seeking to avoid joint and several liability under CERCLA. Pet.App. 53a (Bea, J., dissenting from denial of petition for rehearing *en banc*). The district court's meticulous apportionment, however, amply satisfies or exceeds the "rough approximation" that is sufficient under the Restatement.

The Ninth Circuit faulted the district court's calculations on four grounds, none of which withstands scrutiny. *First*, the Ninth Circuit complained that the district court failed "to account for the possibility that leakage of one chemical might contribute to more contamination than leakage of another, because of the specific physical properties." Pet App. 38a. But, as Judge Bea explained in his dissent from denial of rehearing *en banc*, this is like saying that, in the Restatement cattle illustration, the district court should have considered that "one owner's cattle might have idly stood by while the rest destroyed the crops; one owner's cattle might have more heavy-

of review of a district court's apportionment decisions. The Fifth and Eighth Circuits review *de novo* a district court's decision whether a harm is capable of apportionment, but review for clear error a district court's actual apportionment. *See Hercules*, 247 F.3d at 719; *Bell Petroleum*, 3 F.3d at 896, 902. The Sixth Circuit reviews a district court's determination of indivisibility solely for clear error. *See Township of Brighton*, 153 F.3d 318 & n.13. The decision below purported to adopt the Fifth and Eighth Circuits' approach, while considering, as part of clear error review, "the legal determination whether the party with the burden of proof met that burden." Pet.App. 28a-29a. Shell agrees with the Railroads' position in No. 07-1601 that the standard of review should be clear error.

footed bulls, and less lightfooted heifers." Pet.App. 64a. Moreover, there is no evidence in the record that D-D, the single chemical for which Shell could possibly be liable, might contribute more contamination than any of the other chemicals, especially given the theory of contamination is premised on the D-D being washed from the bulk tank area to the pond.

In any event, the district court's calculations represent a maximum contribution that likely overestimates the extent of the contamination caused by the spillage it attributed to Shell. Significantly, the district court assumed that 100% of the D-D that spilled during bulk unloading reached the pond, which was the source of the contamination, notwithstanding the 230-foot distance between the bulk unloading site and the pond, the absence of constant rainwater at the desert-like site to transport D-D to the pond, and D-D's tendency to evaporate. Pet.App. 82a, 94a-98a, 100a-102a; *see also* J.A. 440 (aerial map of site), 280a-82a (testimony indicating unlikelihood of D-D reaching pond).

Second, the Ninth Circuit faulted the district court for using only six years of invoices to extrapolate the annual bulk deliveries of D-D over 23 years. Pet.App. 39a. But there is no reason to believe that the six years upon which the district court based its calculations are not representative of the annual bulk deliveries. If anything, these figures likely overestimate the actual annual sales. *See supra* at 45 n.18. In any event, nothing in the Restatement or any decision applying the Restatement's apportionment principles requires the production of invoices for each year that contamination occurred. The Restatement's cattle illustration itself eschews such a records requirement. Requiring such precision, as

the Ninth Circuit did, would obliterate the "rough approximation" standard that permits apportionment based on reasonable assumptions.

Third, the Ninth Circuit denigrated the district court's findings with respect to the amount of spillage, contending that they were based on "guesses by witnesses." Pet.App. 39a. But courts have long relied on percipient witness testimony to apportion liability. *See, e.g.*, *Hill v. Chappel Bros.*, 18 P.2d 1106, 1108-10 (Mont. 1932) (relying on percipient witness testimony as "best possible estimate" of causal responsibility for overgrazing on the plaintiff's land where witnesses estimated that they had seen "between 7,000 and 8,000" of the defendant's horses grazing over a three year period, which comprised "six-tenths to one-tenth of the whole"). And there is nothing in the record to suggest that the percipient witnesses' testimony here was anything other than credible, reasonable estimates based on years of employment at B&B. The Ninth Circuit thus had no basis to minimize the weight of that testimony, especially not on review for clear error. *See, e.g.*, *Amadeo v. Zant*, 486 U.S. 214, 223 (1988) ("[A] federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and ... it must give 'due regard ... to the opportunity of the trial court to judge the credibility of the witnesses.'") (quoting FED. R. CIV. PROC. 52(a)); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) ("If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

Further, to require "more precise estimates of the average volume of leaked chemicals during the transfer process," Pet.App. 40a, would put most CERCLA defendants in an impossible bind, particularly given CERCLA's retroactive reach and the significant number of years that often have passed since spills occurred. *See, e.g., Bell Petroleum*, 3 F.3d at 897. The Ninth Circuit's demand for more precision is not faithful to the Restatement's requirement of only a reasonable basis for apportionment. In rejecting mandatory joint and several liability for CERCLA defendants, Congress specifically rejected such a harsh result, declining to "impos[e] on parties excessive liability for harm that is not fairly attributable to them." *Hercules*, 247 F.3d at 717. Hence, the Ninth Circuit's standard is inconsistent with Congress's considered judgment.

Fourth, and finally, the Ninth Circuit noted that the district court had been unable to quantify leakage that occurred when sight gauges on D-D rigs broke. Pet.App. 39a. Shell was not responsible, however, for any sight-gauge leakage that occurred during B&B's operations, *see* Pet.App. 259a, and therefore the district court's inability to quantify that leakage cannot be a just basis to hold Shell 100% jointly and severally liable, especially since including that figure would have *reduced* Shell's apportioned share.

In the end, the decision below is inconsistent with both the Restatement's apportionment standard and the traditional prohibition on appellate fact finding. When a district court apportions CERCLA liability based upon a comprehensive evaluation of the record, an appellate court should not be permitted to turn aside its findings cavalierly under the guise of clear error review. The Restatement requires only a "rough

approximation;" the district court provided far more than that on this record. Accordingly, if Shell is held liable as an "arranger" at all, the district court's apportionment calculation should be reinstated.

CONCLUSION

The judgment of the court of appeals should be reversed in its entirety.

Respectfully submitted,

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